

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.165 OF 2003

Sanjay M. Munot,)
Age: 37 years, Occ: Business,)
R/at 1466, Sadashiv Peth,)
Pune 411 030.) ...Petitioner

Versus

Pune Stock Exchange Limited,)
(Summons to be served on the)
office of the Executive Director)
Pune Stock Exchange Limited))
752, Sadashiv Peth,)
Kumthekar Road,)
Shivleela Chamber,)
Pune 411 030.) ...Respondent

Shri Girish S. Godbole for the Petitioner.

Shri V.G.Mujumdar for the Respondent.

CORAM : ABHAY S.OKA, J.
DATED : MARCH 20, 2007.

JUDGMENT:

1. Heard Advocate for the Petitioner and the Advocate for the Respondent. The Petitioner is the original Plaintiff who filed a suit for declaration and injunction and for damages in the sum of Rs.50,000/-. The suit was dismissed by the trial court and the Petitioner preferred an Appeal before the District Court. In the Appeal, an Application was made by the Petitioner on 17th October, 2002 seeking permission to withdraw the suit and the Appeal with a liberty to file

a fresh suit. The said Application has been rejected by the learned Additional District Judge by the order passed on the same day. By the said order, the learned Additional District Judge permitted simplicitor withdrawal of the Appeal.

2. Shri Godbole appearing for the Petitioner submitted that the prayer made by the Petitioner in the said Application was that permission may be granted to withdraw the suit and Appeal with a liberty to file a fresh suit and therefore, the learned Judge could have either rejected the Application or granted to the Petitioner a permission to withdraw from the suit with liberty to institute a fresh suit as provided under sub-rule 3 of Rule 1 of Order XXIII of the Code of Civil Procedure, 1908. He has placed reliance on the decision of this Court in the case of **Mr Mario Shaw Vs. Martin Fernandez and another [1996(2) Bombay Case Reporter Page 536]**. He also relied upon another decision of this Court in the case of **Devidas Vs. Commissioner, Poona Municipal Corporation [1973 Maharashtra Law Journal Page 889]**.

3. Shri Mujumdar appearing for the Respondent opposed the revision Application by contending that there was no ground available to grant permission to the

Petitioner to file a fresh suit. He submitted that there was no formal defect and there was no other ground available for permitting withdrawal of the suit with liberty to file a fresh suit.

4. I have considered the submissions. The Application made by the Petitioner was for withdrawal of the Appeal and the suit with liberty to institute a fresh suit as provided under sub-rule 3 of Rule 1 of Order XXIII of the said Code. The law is very well settled. If such Application is made for withdrawal of the suit with liberty to file a fresh suit, the Court can either allow the Application by granting liberty as prayed or may reject the Application. However, the court cannot allow the Plaintiff to simply withdraw the suit. In the present case, if the learned Additional District Judge was of the view that no ground was made out for granting leave to the Petitioner to institute a fresh suit, he ought to have simply rejected the Application. In the present case he has granted permission to the Petitioner to withdraw the Appeal without granting leave to institute a fresh suit. Such a course adopted by the learned Additional District Judge was completely erroneous.

5. Under sub-rule 3 of Rule 1 of Order XXIII of the

said Code, where the Court is satisfied that a suit must fail by reason of some formal defect or that there are sufficient grounds for allowing the Plaintiff to institute a fresh suit for the subject matter of the suit or part of a claim, the Court may grant the Plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit.

6. In the present case, from the perusal of the impugned order it appears that the learned Judge has not at all considered whether there was some formal defect as a result of which the suit must fail or that there were sufficient grounds for allowing the Petitioner to institute a fresh suit. The learned Judge has simply observed that "I do not find any reason to grant permission to file Appeal". The perusal of the impugned order shows that the Application made by the Petitioner has not been considered by the learned Additional District Judge on its own merits. The learned Judge has not even referred to the grounds set out in the Application. The learned Judge seems to be under a wrong impression that the prayer was made by the Petitioner to grant permission to withdraw the Appeal with a liberty to prefer a fresh Appeal. It is, therefore, obvious that the Application will have to be

reconsidered by the learned Additional District Judge. After considering whether any case is made out under sub rule 3 of Rule 1 of Order XXIII of the said Code, the learned Judge will have to either allow the Application or to reject the Application.

7. Hence, Revision Application is disposed of by passing the following order:

- (i) The impugned order dated 17th October, 2002 is quashed and set aside and Application at Exhibit 14 made by the Petitioner is restored to the file.
- (ii) The learned Appellate Court will now decide the said Application afresh in the light of the observations made in this Judgment.
- (iii) All contentions of the parties on merits are kept open.
- (iv) The Application shall be decided as expeditiously as possible and in any event within a period of eight weeks from the date of receipt of writ of this order.

- (v) There will be no orders as to costs.

JUDGE